

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THE MINISTRY OF FOREIGN AFFAIRS OF THE ARAB REPUBLIC OF EGYPT	:	DETERMINATION DTA NO. 818737
for Revision of a Determination or for Refund of Real Estate Transfer Tax under Article 31 of the Tax Law for the Year 2000.	:	

Petitioner, The Ministry of Foreign Affairs of the Arab Republic of Egypt, 304 East 44th Street, New York, New York 10017, filed a petition for revision of a determination or for refund of real estate transfer tax under Article 31 of the Tax Law for the year 2000.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 18, 2002 at 10:30 A.M., with all briefs submitted by January 7, 2003, which date began the six-month period for the issuance of this determination. Petitioner appeared by Robert T. Loos, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel).

ISSUE

Whether the Vienna Convention on Diplomatic Relations of 1961 compels the granting of a refund of real estate transfer tax paid by petitioner, a diplomatic mission of a foreign state, where petitioner, an exempt grantor, paid the tax in accordance with its obligations under the contract of sale of the subject real property and in order to record the deed.

FINDINGS OF FACT

1. Petitioner, the Ministry of Foreign Affairs of the Arab Republic of Egypt, is the Egyptian Permanent Mission to the United Nations. As such, petitioner is a diplomatic mission of the sovereign state of the Arab Republic of Egypt, a member nation of the United Nations.

2. Both the Arab Republic of Egypt and the United States of America are parties to the Vienna Convention on Diplomatic Relations, a treaty establishing certain privileges and immunities to be accorded diplomatic missions, adopted in 1961.

3. Petitioner was the owner of a certain building and real property located at 36 East 67th Street, New York, New York (“the Mission Property”). For the entire period petitioner owned the Mission Property, it was occupied and used by the Egyptian Mission exclusively as its headquarters and office.

4. On February 29, 2000 petitioner conveyed the Mission Property to Stadler Capital, Inc. (“Stadler”), a Delaware corporation, pursuant to an Agreement of Purchase and Sale dated February 25, 2000. Section 6.3 of said agreement provides as follows:

6.3. Seller [petitioner] hereby notifies Purchaser [Stadler] that the Seller is exempt from taxation of every kind regarding the lands and buildings owned by the Seller in the United States of America, and Seller believes it is exempt from any and all transfer taxes imposed on the transfer of the Premises. The Seller agrees that in the event the Deed cannot be recorded unless a transfer tax is paid, that Seller shall promptly pay such tax under protest and shall be free to take whatever action or actions it deems necessary or desirable to obtain a refund of such tax. In the event that the State of New York and/or the City of New York attempts to collect any such transfer tax from the Purchaser in connection with the recording of the Deed, Seller shall take such actions as it deems necessary and/or appropriate to prevent the collection of such tax from the Purchaser and in the event such actions are not successful in preventing such collection from the Purchaser, the Seller shall then promptly pay such transfer tax. The Purchaser covenants and agrees, in any and all circumstances, to cooperate with the Seller in order that no transfer tax of any nature is payable in connection with conveying the Premises from the Seller to the Purchaser, including, but not limited to, Purchaser executing and delivering such reasonable documents and instruments which may be required by Seller in order for the Deed to be recorded without the

payment of any transfer tax. The provisions of this Section 6.3 shall survive the Closing and the delivery of the Deed.

5. During the closing petitioner remitted a check of \$294,962.50 to Metropolis Abstract Corp. to cover the cost of the transfer tax as well as other closing costs. Petitioner, as grantor, and the purchaser, as grantee, also signed a joint Combined Real Estate Transfer Tax Return and Credit Line Mortgage Certificate (Form TP-584) which calculated real estate transfer tax due on the subject sale of \$39,000.00 and also claimed an exemption from such tax pursuant to the Vienna Convention on Diplomatic Relations. The explanation further provided that if the recording officer refused to record the deed without payment of the transfer tax, then such payment would be made under protest with the proviso that petitioner did not waive any of its rights by such payment.

6. At the direction of petitioner, Metropolis Abstract Corp. offered the deed of sale with respect to the subject conveyance to the City Clerk of New York County for recording. The City Clerk would not accept and record the deed without payment of real estate transfer tax of \$39,000.00. Accordingly, at petitioner's direction, Metropolitan Abstract Co. paid the transfer tax under protest and the deed was recorded on March 8, 2000.

7. Petitioner filed a claim for refund of real estate transfer tax paid of \$39,000.00 in connection with the subject conveyance dated April 26, 2000. Petitioner claimed exemption from tax pursuant to the Vienna Convention.

8. By letter dated August 8, 2000, the Division of Taxation ("Division") denied petitioner's refund claim. The letter explained the disallowance as follows:

Please be advised that Section 1405(a)(2) of the Tax Law does grant an exemption from payment of the real estate transfer tax to the United Nations, the United States of America and any of its agencies and instrumentalities. However, Section 575.9(b) of the Real Estate Transfer Tax Regulations states in part that the exemption for certain governmental organizations or entities does not extend

to the grantee: that is, if the exempt governmental entity conveys title to real property to a non exempt individual or entity, there will be tax due which is payable by the grantee.

For that reason, we hereby deny your claim for refund. Although the Arab Republic of Egypt was aware that they were exempt from payment of tax, they chose to pay the tax on behalf of the grantee. Accordingly, the Arab Republic of Egypt must seek recourse from the grantee, not the state.

9. Petitioner subsequently filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services. A conference was held on February 6, 2001 and a conciliation order denying petitioner's request was issued on June 22, 2001.

10. Petitioner submitted a letter dated September 30, 2002 from the United States Department of State Office of Diplomatic Law and Litigation in support of its refund claim ("State Department letter").

CONCLUSIONS OF LAW

A. The real estate transfer tax is "imposed on each conveyance of real property or interest therein" (Tax Law § 1402[a]). All conveyances are presumed subject to the tax (Tax Law § 1404). While the grantor in the transaction is generally responsible for the payment of the transfer tax, where the grantor is exempt from the tax, the grantee has the duty to pay the tax (Tax Law § 1404[a]).

B. Tax Law § 1405(a) exempts the following entities from payment of the real estate transfer tax:

1. The State of New York, or any of its agencies, instrumentalities, political subdivisions, or public corporations
2. The United Nations, the United States of America and any of its agencies and instrumentalities.

This subsection further provides that "the exemption of such governmental bodies or persons shall not, however, relieve a grantee from them of liability for the tax."

C. Tax Law § 1405(b) exempts certain conveyances from the transfer tax. Among the transactions listed as exempt therein, the following are relevant to this matter:

1. Conveyances to the United Nations, the United States of America, the state of New York, or any of their instrumentalities, agencies or political subdivisions

D. Tax Law § 1409 requires the filing of a joint return by both the grantor and the grantee for each conveyance of real property, whether or not tax is due thereon. Tax Law § 1410(b) requires the return to be filed and the transfer tax due, if any, to be paid before the deed of the property conveyed may be recorded by the recording officer.

E. Article 23 of the Vienna Convention on Diplomatic Relations of 1961 (*see*, Finding of Fact “2”) provides as follows:

1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in this Article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or head of mission.

F. Treaties, such as the 1961 Vienna Convention on Diplomatic Relations, are the “Supreme Law of the Land” (*see*, US Const, art VI). The State of New York is bound by international treaties such as the Vienna Convention (*see, United States v. City of Glen Cove*, 322 F Supp 149 [ED NY], *affd* 450 F2d 884 [2d Cir]).

G. As petitioner asserts and the Division concedes, although not exempt under the language of the relevant statutory provisions, petitioner, as the grantor in the subject conveyance, was exempt from the payment of the real estate transfer tax pursuant to Article 23 of the Vienna Convention.

H. Given petitioner's tax exempt status, the duty to pay the transfer tax on the subject conveyance shifted to the grantee, Stadler Capital, Inc. (Tax Law § 1404[a]; § 1405[a]). Stadler Capital, Inc. was not exempt from the payment of the transfer tax.

I. Contrary to petitioner's assertion, Stadler Capital, Inc. was solely liable for the payment of the transfer tax at issue under the Tax Law. Petitioner's contention that Tax Law §1404(a) imposes joint and several liability on both petitioner and Stadler misreads that provision, which imposes joint and several liability where "the grantee has the duty to pay the tax *because the grantor has failed to pay* [emphasis added]." Here, the grantor did not "fail to pay"; it was exempt. Petitioner's interpretation of this provision incongruously would impose liability on an entity which is exempt from liability.

J. Its exempt status notwithstanding, petitioner paid the transfer tax at issue in order to record the deed. As discussed above, tax was due and owing on the subject conveyance by the grantee and the recording officer properly required payment of the tax before recording the deed. Petitioner paid such tax not because it was liable under the Tax Law, but because it was obligated to do so under Section 6.3 of the Agreement of Purchase and Sale dated February 25, 2000 (*see*, Finding of Fact "4"). As the language of this provision makes clear, petitioner was aware of its tax exempt status and was aware that the payment of the tax might be required in order to record the deed. Petitioner agreed to make such payment if necessary. Petitioner also agreed to take whatever actions it deemed necessary to prevent the collection of the tax by the Division from the purchaser, and if such actions were unsuccessful, petitioner agreed to pay the transfer tax. Petitioner, a tax-exempt entity, thus paid a transfer tax for which it was not liable under the Tax Law, on behalf of a third party to fulfill a contractual obligation. Petitioner is not entitled to a refund under these circumstances. Petitioner freely entered into the Agreement of

Purchase and Sale and freely assumed the obligation to pay the transfer tax due from the grantee. Petitioner thus voluntarily chose to pay the transfer tax on behalf of the grantee.

K. Petitioner insists that its payment was compulsory because such payment was necessary to record the deed and that petitioner made such payment under protest. Certainly the payment of the tax to record the deed was compulsory; there is no dispute that the recording officer required such payment to record the deed. The payment of the tax *by petitioner*, however, was not compulsory. As discussed, petitioner was not liable for the tax at issue, but agreed to pay pursuant to the Agreement of Purchase and Sale. Petitioner thereby assumed Stadler's obligation to pay the tax. It is reasonable to characterize petitioner's agreement to bind itself contractually to pay the tax as voluntary and it is reasonable, under such circumstances, to deny petitioner's refund claim.¹

L. The forgoing conclusion does not violate the Vienna Convention. Article 23, paragraph 1, of that treaty exempts petitioner from taxes in respect of the mission premises. As discussed, petitioner was exempt from the real estate transfer tax at issue as required under the Vienna Convention. The State of New York did not impose a tax upon petitioner. Petitioner was not, therefore, liable for the tax at issue under the Tax Law of the State of New York. Petitioner assumed the obligation imposed on Stadler under the Tax Law to pay the tax and did so.

M. The September 30, 2002 State Department letter submitted in support of petitioner's refund claim asserts that the shifting of liability for the real estate transfer tax under the Tax Law to the grantee where, as here, the grantor is exempt will cause such grantee/buyer to reduce its

¹ There is also no dispute that petitioner paid the tax at issue under protest and properly filed its refund application and did not waive its right to claim a refund. Such refund claim is properly denied, however, because of petitioner's voluntary assumption of Stadler's liability pursuant to the Agreement of Purchase and Sale.

purchase price, thereby effectively depriving the foreign government of its treaty-based tax exemption. This assertion is rejected. Paragraph 1 of Article 23 of the Vienna Convention provides for an exemption from taxation. As discussed, petitioner was exempt from the transfer tax in the subject transaction; the Tax Law did not impose liability on petitioner to pay the tax at issue. Article 23 of the Vienna Convention does not purport to provide foreign missions with protection from the economic impact of taxes imposed on persons contracting with the mission. Indeed, paragraph 2 of Article 23 appears to support the finding that the imposition of the transfer tax on Stadler did not violate the Vienna Convention. That paragraph states that the mission's exemption from taxes in respect of its premises "shall not apply" to taxes payable by persons contracting with the mission. Here, the transfer tax at issue was payable by a person (Stadler) contracting with the mission. Pursuant to paragraph 2, petitioner's exemption does not apply to such a tax. Thus petitioner's economic impact argument must fail.

N. The State Department letter further asserts that Article 23, paragraph 2, of the Vienna Convention is not intended to permit the arrangement under the Tax Law where liability shifts to the grantee if the grantor is exempt. Rather, the State Department letter asserts that this paragraph is intended to prevent distortion in the marketplace and a windfall to a private party that avoids taxes for which it is normally liable by passing them on to a tax-exempt foreign government. The State Department letter cites E. Denza, *Diplomatic Law*, at 153 (2d ed 1998) in support of this contention. Denza, however, does not support the State Department's position. While not directly addressing the imposition of a transfer tax on a grantee where the grantor is a diplomatic mission, in discussing an analogous situation in the context of paragraph 2 of Article 23, Denza states that a landlord may specify in a lease that taxes which would normally fall on the landlord should be defrayed by the mission. In such a case, according to Denza, the liability

under the lease becomes part of the consideration for the use of the premises and is, therefore, not the payment of taxes but an increase in rent. If, however, the effect of any agreement between a mission and a landlord is that the liability for the taxes falls directly on the mission, then Denza asserts that the exemption under Article 23 would apply. In the instant matter, the transfer taxes do not fall directly on petitioner. As discussed, the grantee bears sole responsibility for the tax under the Tax Law. Petitioner's obligation to pay the tax was contractual and petitioner's payment of such tax was, in effect, a part of the terms and conditions for the sale of the subject premises. Pursuant to the reasoning in Denza, then, petitioner's payment of the transfer tax was not contrary to Article 23 of the Vienna Convention.

O. As to the assertion in the State Department letter that the intent of paragraph 2 of Article 23 is to avoid distortion in the market and a windfall to a private party, it is clear that the imposition of transfer tax on the grantee in this case does avoid distortion in the marketplace and does avoid a windfall *to petitioner*. The imposition of transfer tax upon a party to the transaction merely places this transaction on the same footing as nearly all other real estate transactions in New York. Furthermore, the treatment accorded this transaction, i.e., the imposition of tax on the grantee, is identical to the treatment accorded any transaction having the United States or the State of New York as grantor. Petitioner's claim of unfair treatment is thus unfounded and the granting of a refund to petitioner under the instant circumstances would be a windfall.

P. As petitioner correctly notes, "[a]lthough not conclusive, the meaning attributed to treaty provisions by Government agencies charged with their negotiation and enforcement is entitled to great weight" (*Sumitomo Shoji America, Inc. v. Avagliano*, 457 US 176, 184-185). In this case, however, the meaning attributed to the treaty provisions by the State Department letter is inconsistent with the treaty's plain language and is also inconsistent with the authority

cited in the letter in support of the State Department's position. The State Department letter is thus unpersuasive.

Q. Petitioner also asserted that the Division's denial letter is without merit under New York law because such letter cited law and regulations not applicable to petitioner and failed to cite the Vienna convention. This is a nonissue. While the authorities cited were inaccurate, the denial letter did accurately set forth the position the Division has maintained throughout this dispute: That although petitioner was exempt, the grantee was not, and petitioner voluntarily paid the tax due on behalf of the grantee. The denial letter thus reasonably explained the Division's basis for the denial. Furthermore, Tax Law § 1412(b) requires only that the Division grant or deny a refund application; this provision does not require the Division to state the basis of its position.

R. The petition of The Ministry of Foreign Affairs of the Arab Republic of Egypt is denied and the Division of Taxation's denial of petitioner's refund claim is sustained.

DATED: Troy, New York
June 26, 2003

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE